United States Court of Appeals

for the Second Circuit

APPENDIX

75-7493

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",

Third-Party Plaintiff-Appellant,

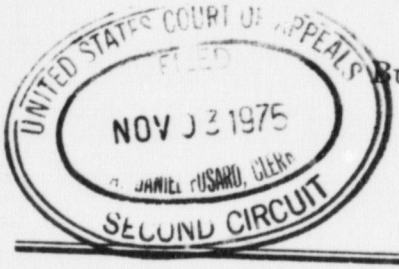
—against—

GTE INTERNATIONAL, INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX



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Relevant Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civil 2729 TPG

BINDO DI GREGORIO,

Plaintiff,

—against—

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",

Defendant and Third-Party Plaintiff,

—against—

UNIVERSAL TERMINAL & STEVEDORING CORP., GENERAL TELEPHONE & ELECTRONICS CORP., and GTE INTERNATIONAL, INC.,

Third-Party Defendants.

June 21-71—Filed Complaint; Issued Summons.

Aug. 13-71—Filed Answer to Complaint.

Feb. 23-72—Filed Third-Party Complaint; Issued Third-Party Summons.

Jan. 19-73—Filed Answer of Third-Party Defendant GTE International, Inc.

June 2-75—Jury Trial Begun.

June 3-75—Trial Continued.

Relevant Docket Entries

June 4-75—Trial Continued.

June 5-75—Trial Continued.

June 6-75—Trial Continued and Concluded; See Special Verdict.

July 10-75—Filed Opinion and Order #42766; Motions for Judgment Notwithstanding Verdict are Granted.

July 22-75—Filed Judgment #75,626 that Plaintiff Have Judgment against Defendant in the Amount of $50,000 with Costs, and that the Third-Party Claims Be Dismissed.

Aug. 20-75—Filed Defendant and Third-Party Plaintiff's Notice of Appeal.

Trial Transcript Excerpts

[532] * * * * *

CHARGE OF THE COURT

* * * * *

[542] * * * * *

* * * The duty is a continuing one and it is non-delegable, that is, it cannot be passed on to some other party.

Relinquishment of control of the vessel or part of the vessel to an independent stevedoring company does not relieve the shipowner of its absolute duty to supply a seaworthy vessel. * * *

[543] * * * * *

As I said, the shipowner's duty to supply a seaworthy vessel is absolute and if the shipowner fails in this duty and as a proximate result a crew member or a longshoreman servicing the ship's cargo is injured, then the shipowner is liable for the resulting damages. This absolute liability is imposed even though the shipowner may have been free from fault and even though none of the employees or anyone in charge of the ship knew of the defective or unseaworthy condition. Liability for unseaworthy condition does not in any way depend upon negligence, fault or blame.

* * * * *

I guess the most helpful way to say this is that unseaworthiness is really a physical condition, and how that condition came into being and whose fault it might have been [544] is irrelevant. The liability depends on the existence of the condition, physical condition.

* * * * *

[556] * * * * *

The final claim I need to instruct you on is the claim of Nederland for indemnity against GTE International, Inc., which we are calling GTE. Nederland claims that GTE was negligent and that such negligence was one of the causes of the defective case. Nederland contends, as I have said.

Now, by way of defense GTE contends, first, that Nederland has failed to prove that the case on which the accident occurred was a case shipped by GTE. But GTE contends that if you find that the accident occurred on a case shipped by GTE, then GTE has a second defense and contends that Nederland has failed to prove negligence. So GTE has raised two issues, the case; secondly, the basic question of [557] its negligence.

If you find for GTE on the first contention, that is, if you find it wasn't a case shipped by GTE, that is the end of the matter as to GTE.

My remaining instructions on the issue about GTE will deal with GTE's second contention, that is, that it wasn't negligent. In order for me to discuss this problem intelligently, I have got to assume solely for purposes of discussion that this was GTE's case, a case shipped by GTE; otherwise I couldn't talk to you about it. But I am not telling you how to find on the first issue.

There was no contention by any party that GTE actually made the case or handled the case physically in any way. The evidence is that the case was made by or under the direction of the company from whom GTE purchased the two antennas and the related equipment, namely, Ainslie Antenna Company, Limited.

Nederland claims that GTE was negligent in not taking sufficient steps to direct or instruct or in some other way

insure that Ainslie provided a sufficiently strong and safe packing case. The burden of proof is on Nederland to prove such negligence by a fair preponderance of the evidence.

Negligence is the failure to exercise reasonable care under all the circumstances. It is the doing of something [558] which a reasonably prudent man would not do, or the failure to do something which a reasonably prudent man would do.

In judging this particular claim of negligence by Nederland against GTE, you are dealing with something which may seem less familiar to you than if you were dealing with the movements of a man or the driving of a car or something like that. What you are being asked to judge relates to the question, what was reasonable business practice for GTE to follow in the transaction in question.

GTE's evidence is that GTE received an order from a company in Arabia for certain eight-foot antennas and related equipment. GTE did not itself make or manufacture such antennas. GTE, through a subsidiary, ordered these antennas, bought them from Ainslie, a Montreal company.

There is nothing improper in GTE ordering and buying this equipment from Ainslie for shipment to GTE's customer in Arabia. This is an ordinary and proper business procedure.

The question is whether GTE should have given Ainslie more instructions than it did on the subject of packing, or should have inspected the packing, or should have done something more than what GTE did do.

You judge the particular problem before you by asking this question: What would a reasonably prudent [559] businessman in the position of the responsible people at GTE do under the circumstances? When I say under the

circumstances, I mean the situation then existing and with the knowledge they then had. You don't judge by a hindsight standard, obviously.

With these considerations in mind, I instruct you that if GTE had reason to believe that Ainslie was competent and capable of doing proper and safe packing for the type of export shipment that went on here, and had no notice that Ainslie would fail to do such packing, then GTE was under no requirement to give further instructions to Ainslie or to supervise Ainslie or instruct Ainslie's packing.

The sole question before you then, on this point is: Would a reasonably prudent man at GTE have reason to believe that Ainslie would pack the goods properly for export, or would he have reason to believe otherwise?

If the first hypothesis is correct, GTE could leave it to Ainslie. If the second hypothesis is correct, obviously GTE had to go farther than it did.

GTE's evidence is that it put the instructions "Export packing", on the purchase order to Ainslie and paid for such packing. That is GTE's contention. GTE further contends that it had previously ordered antennas and equipment of this type from Ainslie for shipment to both domestic and [560] foreign customers, and GTE contends that it had never received any complaints or experienced any trouble.

Nederland, on the other hand, contends that GTE had insufficient knowledge of Ainslie to justify it in trusting that Ainslie had the knowledge or competence or would properly pack for the type of export shipment that went on here without further instructions or inspection.

If you find that Nederland has proved by a preponderance of the evidence that GTE had notice of some inability

on the part of Ainslie to pack for export shipping, it follows that GTE was negligent in not taking further steps than it did regarding the pack. But if you find that Nederland has not proved that GTE had notice of some inability on the part of Ainslie, your verdict must be for Nederland in that —I'm sorry, your verdict must be that Nederland has not proved negligence on the part of GTE.

Now, I will instruct you on one final point—incidentally, you will see the Question No. 6 is as follows:

Do you find that GTE International, Inc. was negligent and that such negligence was a proximate cause of the plaintiff's injury?

As I said, I will instruct you on one final point. That is this: Nederland has a second contention against GTE. It is, I think, something you haven't heard much of. [561] I am not sure the lawyers have articulated this in the way I have phrased this and it might come as a bit of a surprise to you, but it is in the case and you need to deal with it.

Nederland contends that GTE is liable even though GTE wasn't itself negligent, but that GTE is liable for any negligence of Ainslie. I don't think it would assist you to elaborate on this theory further, but I am simply instructing you will need to answer a question on this form as follows:

Do you find that Ainslie Antenna Co., Ltd. was negligent and that such negligence was a proximate cause of plaintiff's injury?

I don't want this to confuse you. It's true that Ainslie is not here as a defendant, but for purposes of the legal theory of Nederland that it can recover from GTE on the basis of some negligence of Ainslie, I have to ask you to consider if there was enough evidence in this case from

which you can conclude that Ainslie was negligent in making this case the way it did. Nederland contends that there is sufficient evidence to demonstrate that it was negligent of Ainslie to use the box made of particle board with the number and type of supports that were in that box.

Basically, Nederland contends that the mere evidence about the type of the box means that Ainslie was negligent, and if you believe that there is enough evidence from that, [562] and that that satisfies Nederland's burden of proof, you will answer that question "Yes."

On the other hand, GTE contends that there was insufficient evidence in this case to show such negligence on the part of Ainslie; that not enough has been proved about Ainslie's conduct to justify such a finding.

That concludes my instructions on the claims and on these questions which you will answer. * * *

* * * * *

[564] * * * * *

[In the robing room:]

* * * * *

[566] * * * * *

Mr. Kimball: This is in respect of Nederland Lines' requests as to the third-party defendants. I most respectfully [567] except to your Honor's failure to charge the substance of numbers 6—number 6 only. I would like to point out something, your Honor. In respect of number 6, you have never told this jury that what GTE's liability if any is as shipper. You have said to them that if they find that GTE was negligent in certain respects, why, then, they can do this and that. But since you have never told them,

as we have asked you to, that GTE would be liable to indemnify Nederland Lines for negligent failure to provide a reasonably safe and suitable cargo container, relying upon the Williamson and Simpson cases there cited. And I do respectfully suggest to your Honor that there is a vacuum in your charge in that respect.

The Court: Okay. Fine. You are talking really about—the point you just made, 6 is a long thing—

Mr. Kimball: It is. I am perfectly prepared to abandon all of 6 above the part that I just read you because it seems to me—

The Court: I got you.

Mr. Kimball: It is so vital to a charge. I affirmatively, respectfully except to your Honor's having charged in substance, and I am not a shorthand reporter, but you charged, it seemed to me, along the line that there was nothing improper in GTE ordering this equipment from Ainslie, [568] and in so charging, you ruled out any negligence in the selection of Ainslie, and for that reason I respectfully except to that portion of the charge.

You further charged that GTE was under no duty to supervise, instruct or inspect the product if it had no reason to believe that Ainslie would not package the commodity properly, which I respectfully except to, because it reduces GTE's liability here perhaps almost to the vanishing point.

And finally, you charged that if Neder Line did not prove notice by GTE of Ainslie's inadequacy, then the verdict should be for GTE. But you never told the jury that notice can be of two sorts. It can be actual notice or it can be constructive notice. I therefore believe that your charge is misleading in that respect. The more so because

of the emphasis made during summation to what I conceive to be the inadequacies of GTE's defense of ignorance. It closed its eyes to the entire thing and thereby avoided, made it physically impossible for it to know anything. That concludes the exceptions, if your Honor please.

The Court: I think my charges about GTE and Ainslie were made designedly and I know that we disagree on that. The one point I want to ask you about, though, is the question of notice. One slight problem, and goodness knows, [569] I don't expect any lawyer to draft the actual charge used by the Court, but I got almost nothing in the way of specifics on this charge against GTE about negligence. I'd be perfectly happy if there is something I should explain to them further about notice. Just expand upon that. Tell me right now.

Mr. Kimball: I'd respectfully ask your Honor to say something along these lines: During the course of my charge I mentioned to you the requirement that in respect of the Nederland Line claim against GTE that Nederland Line had the burden of proving notice by GTE. When I used the word "notice" I used it in a kind of legal way, which includes two things legally. Something that GTE may have actually noticed if anything, or something which GTE in the ordinary—in the exercise of ordinary care ought to have noticed. The latter we call constructive notice, so that at law a party can be charged with notice because they do know it or because they reasonably ought to have known it.

The Court: How do you instruct them the content of the word ought? Ought means somebody ought to have known, found out—

Mr. Kimball: They reasonably ought to. Or they non-negligently ought to.

Mr. Cohen: May I be heard on that, your Honor?

The Court: Yes.

[570] Mr. Cohen: I thought, even though I disagreed with your Honor submitting certain issues to the jury as this record indicates, that the manner in which your Honor did submit the issue fairly and accurately did state it as your Honor sees it. Mr. Kimball's request now dealing with the further charge on constructive notice I think would be out of order, giving undue emphasis to a single aspect of the case, and legally invalid for that reason.

The constructive notice as I understand it deals with a situation where the party sought to be charged with it has possession or control over the allegedly defective object. In other words, if something is in my physical possession or control, then I am—and it's been there long enough, then I am charged with having ought to know about it. If I don't have physical possession or control, constructive notice is inapplicable as a matter of law.

In this case we are talking about, if I understand in the issue your Honor gave to this jury, is whether or not we knew that Ainslie would not turn out an adequate product. And there is no proof whatever that we had any reason to know about it, but that is not the point. That is actual notice.

I don't see how constructive notice applies to that sort of situation unless perhaps there may have been and there never was some proof that there had been a long history of [571] problems with Ainslie as a supplier. I think what it reasonably comes down to is that in the context of the issue

you are talking about here, I think you have adequately charged this jury on notice, constructive notice to this kind of situation. I just don't see it applicable.

The Court: I think it is an interesting point and it is a point where Mr. Kimball has a sharply different view than the one I have expressed in my charge and that we can't get around. I will just say this, that what I resolved to do really in the last 24 hours or 48, or whatever it is, and this is the basis for my ruling, I might as well say it now, I believe that in normal business it is proper, it is usual, it is constantly done for somebody to order goods from people like Western Electric or Ainslie or U. S. Steel or Bloomingdale's or Macy's, or a host of other entities and have them sent as gifts or to fulfill business commitments; and our whole system of doing business of that kind depends on people being able to order and have things sent, and it is so usual and I would be, I think, completely out of line to suddenly announce a rule or imply a ruling in a jury instruction that required a customer of this kind to go and supervise the packing.

Secondly, if you are ordering heavy equipment like eight-foot diameter antennas, if the company is good enough [572] to make them, I think there is almost a presumption that they are good enough to make a box to put them in.

Mr. Kimball: But they weren't, Judge. That you know.

The Court: That is a beautiful hindsight situation. I don't get as much out of interruptions as you do. I was going to put my little decision on the record. That is basically it. The formulation I stated was the best I could do. However, I am perfectly willing to express that

view and to also take into account that the basic burden of proof on the issue of negligence is Nederland. So be it. I think I will live with that.

Mr. Cohen: May I have a moment to make one statement on the record?

The Court: No, Mr. Kimball first.

Mr. Kimball: I am not going to belabor it at all. I merely wanted the record to reflect that I disagree with the position which the Court has taken.

Mr. Cohen: May I have the privilege of making a statement for the record. Disagreeing as I do with the submission of the issue, regardless of that it's been submitted, and I would like to state for the record at this time I thought the charge as given was excellent not only in substance, but in the tone and style of delivery. I compliment [573] you on the manner in which you gave this charge.

* * * * *

Mr. Kimball: Exceptions.

The Court: Okay.

[End of robing room conference.]

The Court: There are a couple of points which I have been asked to make expressly, although hopefully they were really implicit in what I said, and I hope this will not confuse you in any way.

* * * * *

Secondly, I described to you the claim as I did of Nederland against GTE and I was reminded that I didn't state to you the consequences of what I told you, and I think it is implicit, but, of course, it should be explicit though you will understand. If GTE is liable to Nederland under the

rules that I described to you, then it means that GTE would be liable to indemnify the shipowner for anything that the [574] shipowner would have to pay to the plaintiff.

* * * * *

[580] * * * * *

The Court: Mr. Foreman, do you have a verdict?

The Foreman: Yes, sir, your Honor, we do.

The Court: Do you have the form filled out?

The Foreman: Yes, sir.

The Court: Would you please read it?

The Foreman: Do you find that an unseaworthy condition on the Neder Weser proximately caused plaintiff's [581] injury?

Answer: Yes.

If the answer to No. 1 is yes, what is the dollar amount of damages for such injury?

Answer: $50,000.

Do you find that plaintiff was contributorily negligent?

Answer: No.

I trust I can skip No. 4.

The Court: Yes. 4 would not be answered.

The Foreman: Question No. 5: Do you find that Universal breached its warranty of workmanlike performance to Nederland and that such breach was a proximate cause of plaintiff's injury?

Answer: Yes.

If your answer to No. 5 is yes, [A], Question:

Is it because you find that Universal knew or should have known of a defect in the case?

Answer: Yes.

[B]: Is it because you find that plaintiff was contributorily negligent?

Answer: No.

Question No. 6: Do you find that GTE International, Inc. was negligent and that such negligence was a proximate [582] cause of plaintiff's injury?

Answer: Yes.

Question No. 7: Do you find that Ainslie Antenna Company, Limited was negligent and that such negligence was a proximate cause of plaintiff's injury?

Answer: Yes.

* * * * *

The Court: Thank you and good night. Would you give the verdict form to the Clerk and we will have it marked as Court Exhibit 3.

[Court Exhibit 3 marked.]

* * * * *

[583] The Court: Are there any other motions?

Mr. Cohen: Yes, your Honor. If your Honor please, on behalf of the defendant third-party GTE International, Inc. I also move to set aside the verdict and for judgment N.O.V. on the ground that there is no evidence in the case at all that GTE International, Inc. knew or should have known that Ainslie could not have packaged the antenna, which was the issue submitted to this jury insofar as my client was concerned. I submit there is no proof of that at all.

* * * * *

Opinion

GRIESA, J.

This longshoreman's personal injury action was tried to a jury, resulting in a verdict for plaintiff in the amount of $50,000 based upon an unseaworthy condition of defendant Nederland's vessel, the NEDER WESER. The jury further found in effect that it was negligence on the part of third-party defendants Universal Terminal & Stevedoring Corp. and GTE International, Inc. which actually caused plaintiff's injury.

Under this verdict Nederland would be liable to plaintiff, but would be entitled to indemnity from Universal and GTE.[1]

Universal and GTE move under Fed. R. Civ. P. 50(b) for judgment notwithstanding the verdict. These motions are granted.

I.

On April 11, 1970 the NEDER WESER was being loaded in Brooklyn, New York. The stevedoring work was being performed by Universal.

Plaintiff, an employee of Universal, was working in Number 2 Hatch and was walking on top of certain crates, preparing to assist in the placement of a crate then being lowered into the hatch. The top of one of the crates col-

[1] Following the trial, counsel for Nederland submitted an affidavit showing that Nederland's counsel fee and disbursements for defending plaintiff's claim amounted to $3,080. Nederland includes this amount in its indemnity claim. There is no dispute as to the reasonableness of the $3,080. But, for the reasons set forth in this opinion, Nederland is not entitled to indemnity in any amount.

lapsed under plaintiff's weight and plaintiff was injured as a result.

The jury was asked to return a special verdict, and found that an unseaworthy condition on the vessel caused plaintiff's injury, that plaintiff was not contributorily negligent, and that the amount of damages to plaintiff was $50,000.

II.

The crate causing the injury was shipped on the NEDER WESER by third-party defendant GTE.

The evidence shows that this crate was one of four crates which were shipped by GTE on the NEDER WESER. Two of these crates contained 8′ diameter parabolic antennas and two of the crates contained mountings for these antennas. The antennas and their mountings had been ordered from GTE by Oilfield Supplies and Services for use in Saudi Arabia. GTE referred this order to its subsidiary, Lenkurt Electric Co. of Canada, Ltd. Lenkurt in turn purchased the antennas and the mountings from another Canadian company—Ainslie Antenna Co., Ltd. of Montreal.

In the purchase order to Ainslie, there was the notation "Export Packing". Ainslie made a special charge for such packing.

GTE's freight forwarder arranged to have the four crates picked up from Ainslie. Ainslie delivered the four crates F.O.B. Montreal. A trucker hired by the freight forwarder transported the crates to Brooklyn and delivered them to Universal, which loaded the crates onto the vessel.

Beyond placing the notation "Export Packing" on the purchase order, neither GTE nor Lenkurt gave Ainslie

any instructions as to how the equipment was to be packed. Neither GTE nor Lenkurt made any inspection of the crate at any time. The packing was entrusted entirely to Ainslie.

The evidence at the trial indicated that the crate in question was constructed of a composition material called "particle board" strengthened to some extent by wooden battens. Nederland introduced expert testimony at the trial to the effect that particle board was an inadequate material for the crate, unless strengthened by more wooden battens than the crate apparently contained. The expert's specific recommendation was that additional interior battens should have been used in the construction of the crate.

In its special verdict the jury found as follows:

(a) Universal breached its warranty of workmanlike performance to Nederland and such breach was a proximate cause of plaintiff's injury. The jury found that such breach was not the result of any negligent act of plaintiff (an employee of Universal) but that such breach resulted from the fact that Universal knew or should have known of a defect in the crate.

(b) GTE was negligent and that such negligence was a proximate cause of plaintiff's injury.

(c) Ainslie Antenna Co., Ltd. was negligent and such negligence was a proximate cause of plaintiff's injury.

III.

Universal's motion for judgment notwithstanding the verdict is grounded on the assertion that there was a total lack of proof that there was any defect in the crate which

was obvious to Universal or which should have been detected by Universal. At the oral argument of the motion, counsel for Nederland stated that Nederland does not oppose Universal's motion. It is therefore granted.

IV.

Nederland's main case for indemnity has always been pitched against GTE, whose motion for judgment notwithstanding the verdict Nederland strongly opposes.

Nederland advances two basic theories against GTE. First, Nederland argues that Ainslie was negligent in the construction of the crate and that Ainslie's negligence must be imputed to GTE. Second, Nederland argues that GTE itself was negligent in selecting Ainslie to do the packing, in failing to give Ainslie proper instructions regarding packing, and in failing to inspect the packing after it was carried out by Ainslie.

The rule governing the responsibility of a shipper such as GTE is contained in Section 4(3) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(3), which provides:

> "(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

Dealing with Nederland's first theory against GTE—*i.e.*, the theory of imputing Ainslie's negligence to GTE, we start with the finding of the jury that Ainslie was negligent in the construction of the crate. There is ample support for this finding in the evidence. But the question which

must then be resolved is whether GTE can be held liable under the statute for Ainslie's negligence. I hold that it cannot.

The shipper's liability is expressly limited by the statute to situations where there is some act, fault, or neglect on the part of the shipper, his agents, or his servants. Nederland has never argued that Ainslie falls in any of the specified categories. Ainslie clearly was not the shipper or the agent or the servant of the shipper, GTE. Ainslie was merely the seller of goods to Lenkurt. There is no indication whatever that GTE or Lenkurt exercised any control over the conduct of Ainslie in the production or packaging of the antennas and mountings. Under these circumstances there would be no basis for holding Ainslie to be the agent or servant of either GTE or Lenkurt. *Restatement of Agency* (*2d Series*) § 2.

Nederland's argument, however, is that the negligence of Ainslie should be imputed to GTE on the theory that GTE had a non-delegable duty to ensure that the antennas and mountings were properly packed. This theory is contrary to the express wording of the statute, and must be rejected.

The other theory of Nederland against GTE is that GTE itself was negligent. The jury found that it was. If such finding can be sustained, there would clearly be a basis under the statute for liability of GTE to Nederland. *Williamson* v. *Compania Anonima Venezolana de Navigacion,* 446 F.2d 1339 (2d Cir. 1971), *cert. denied,* 404 U.S. 1059 (1972).

Nederland contends that GTE was negligent in the selection of Ainslie, and was further negligent in failing to give

detailed instructions to Ainslie as to the method of packing and in failing to inspect the packing after Ainslie had carried it out.

Nederland greatly exaggerates, in my view, the proper scope of GTE's responsibilities. As already described, there is no evidence to suggest that Ainslie occupied any other relationship to GTE or Lenkurt than the normal supplier or seller of goods. A buyer normally has no duty under the law to supervise the seller in the process of producing or packing the purchased goods.

In the present case, Lenkurt ordered the antennas and mountings to be packed for shipment to a customer abroad. This is a normal commercial practice, and is not attended by any duty on the part of GTE or Lenkurt to intervene and supervise or inspect the packing. A purchaser such as GTE or Lenkurt would naturally trust Ainslie, the supplier of these large radio antennas, to determine the proper method of packing. Moreover, as to the sufficiency of the notice "Export Packing", there is no suggestion as to how this would fail to apprise Ainslie of the obvious fact that these crates would be conveyed by truck and ship and would need to be handled by persons in loading and unloading.

The only conceivable reason for imposing some additional duty on GTE or Lenkurt might be some circumstance putting GTE or Lenkurt on notice of inability or incompetence on the part of Ainslie to do the proper packing. The question of GTE's negligence was submitted to the jury on this basis, and on this basis alone. As already noted, the jury found that GTE was negligent.

I now hold that there was not the slightest evidence to support such a finding. There was no evidence whatever to indicate that GTE or Lenkurt had notice of anything which would give them reason to believe that Ainslie was incapable of packing these antennas properly for export shipping as directed. Indeed, the only evidence on the point is that Lenkurt had previously ordered such antennas from Ainslie, both for domestic and export shipment, and never experienced any difficulties.

Nederland brought out from the testimony of a GTE employee that GTE did not have an export packaging department and did not employ a packaging engineer or expert. An employee of Lenkurt testified, on the other hand, that Lenkurt had a shipping department responsible for packing all items produced at Lenkurt's factory. Nederland's counsel questioned each of these witnesses extensively to show their personal ignorance of packaging procedures.

This evidence was all, in the last analysis, extraneous, and would probably have been excluded at the time it was offered, if the Court had arrived at the proper formulation of GTE's responsibility. I believe that, under the correct view of the case, neither GTE nor Lenkurt had any duty to send packers or packaging experts to Ainslie to perform or supervise the packing of these antennas and mountings. To impose a duty upon a purchaser of goods to exercise surveillance over the packaging by the seller would be a totally unjustified interference with normal and sound commercial practice.

There was a suggestion at the trial that some liability might attach to GTE because of the fact that GTE's freight forwarder, and a trucker employed by GTE, assumed control of the crates after delivery by Ainslie in Montreal. However, the mere taking of title or control by GTE's agents does not mean that these agents were negligent. And there was no showing whatever of any basis in law or fact for holding them negligent. There was no evidence to indicate that they (any more than Universal) knew or should have known of inadequate battens inside the crates or other defect in the packing.

CONCLUSION

The motions of third-party defendants Universal Terminal & Stevedoring Corp. and GTE International, Inc. for judgment notwithstanding the verdict are granted.

The Clerk is directed to enter judgment in favor of plaintiff against defendant Nederland in the amount of $50,000, and in favor of third-party defendants dismissing the third-party claims. Costs will be taxed by the Clerk.

Dated: New York, New York
July 9, 1975

THOMAS P. GRIESA,
U.S.D.J.

Judgment

The issues in the above entitled action having been brought on regularly for trial before the Honorable Thomas P. Griesa, United States District Judge, and a jury, on June 2, 3, 4, 5 and 6, 1975, and the Court having submitted the attached special questions to the jury, and the jury having answered the said questions, and the jury having returned a verdict in favor of the plaintiff, and at the conclusion of the trial motions having been made to set aside the verdict, and the Court thereafter on July 10, 1975, having handed down its opinion granting motions of the third-party defendants notwithstanding the verdict, and directing the Clerk to enter judgment in favor of plaintiff as against defendant, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiff Bindo Di Gregorio, have judgment against defendant N.V. Stoomvaart Maatschappij "Nederland", in the amount of $50,000., with costs to be taxed, and it is further,

ORDERED: That the third-party claims be and they are hereby dismissed.

Dated: New York, N.Y.
July 21, 1975

RAYMOND F. BURGHARDT,
Clerk.

APPROVED:

THOMAS P. GRIESA
U.S.D.J.

Notice of Appeal

To: *The Clerk of the Court*

SIR:

Notice is hereby given that N.V. Stoomvaart Maatschappij "Nederland", defendant and third-party plaintiff in this action, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the final Judgment (No. 75,626) entered in this action on or about the 22nd day of July 1975 as is in favor of GTE International, Inc., third-party defendant herein, dismissing the third-party claims herein of said defendant and third-party plaintiff against said third-party defendant, and from so much of the Opinion (No. 42,766) filed herein on or about the 10th day of July, 1975 as is in favor of said third-party defendant, granting said third-party defendant judgment notwithstanding the verdict herein in favor of said defendant and third-party plaintiff against said third-party defendant.

New York, New York
August 20, 1975

Yours, etc.,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Defendant and
Third-Party Plaintiff
By WILLIAM M. KIMBALL
A Member of the Firm
25 Broadway
New York, New York 10004

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",

Third-Party Plaintiff-Appellant,

- against -

GTE INTERNATIONAL, INC.,

Third-Party Defendant-Appellee.

- -x

75-7493

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

James P. Sawicz, being duly sworn, deposes and says that he is a clerk in the office of Burlingham Underwood & Lord, attorneys for Third-Party Plaintiff-Appellant "Nederland" herein; that on the 31st day of October 1975, he served the within Appendix by mailing three copies thereof, securely enclosed in a postpaid wrapper, in the post office box regularly maintained by the United States Government at 25 Broadway in the said County of New York, to each of the following:

Joseph Arthur Cohen
Alexander Ash Schwartz & Cohen
801 Second Avenue
New York, New York 10017

The address of each of the above is the address designated by each of them for that purpose upon preceding

papers in this action, or the place where each then kept an office.

James P. Lavin

Sworn to before me this
31st day of October, 1975.

Regina H. Blenk

REGINA H. BLENK
Notary Public, State of New York
No. 41-4507613
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1977

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